

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

OLA PROPERTIES, INC, and
AFISU OLABIMTAN

Respondents.

HUDALJ 05-040-CMP
OGC Docket No. 05-002-FW

**ORDER GRANTING, IN PART, AND DENYING,
IN PART, GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT**

Upon consideration of the Government’s Motion for Summary Judgement, with Memorandum in Support Thereof, and Respondents’ opposition thereto, I conclude that the motion should be granted. Considering the evidence in the light most favorable to the Respondents, I conclude that there is no issue of material fact concerning Respondents’ knowing and material failure to file timely audited annual financial statements with the Secretary for fiscal years 1999, 2000, 2001, 2002, and 2003 as required by the Regulatory Agreement Respondents entered into with the Secretary on January 30, 1997, as supplemented by HUD Handbook 4370.2, Rev -1 (5/92) as charged in the Complaint in the above-entitled matter.

Respondents Ola Properties, Inc. and Afisu Olabimtan, as President of Ola Properties, Inc., signed a Regulatory Agreement on January 30, 1997, wherein they agreed, inter alia, to file annual financial statements prepared in accordance with the requirements of the Secretary. One of the requirements of the Secretary, as relevant to this case, is that all owners of multifamily properties whose mortgages are insured by HUD, file *audited* annual financial statements. See HUD Handbook 4370, Rev-1, Section 3-3 and 24 C.F.R. § 5.801(b)(2). See also Affidavit of Tom V. Visage, paragraph 2. Failure to file audited annual financial statements is a material violation of the agreement with the Secretary. See *HUD v. Crestwood Terrace Partnership*, HUDALJ 00-002-CMP, January 30, 2001.

Respondents submitted annual financial statements to the Secretary for fiscal years 1999, 2000, 2001, 2002, and 2003. The statements were not audited but were “compilations.” These “compilations” are not acceptable to HUD in light of the

requirements that the statements be “audited” statements. Although Respondents, individually and collectively, have opposed the Motion for Summary Judgement, close scrutiny of the Answer to the Complaint and the response to the Motion shows that Respondents do not claim that any of the annual financial statements for the years in question were *audited*. Respondents’ Answer asserts that they met the requirements of the Regulatory Agreement for the filing of a financial statement because the annual financial statements “were prepared by a certified public accountant and were certified to by an officer of the mortgagor - an acceptable option in the Agreement.” See Answer at paragraph 8. A statement from John G. Robinson & Company, an accounting firm hired by the Respondents to prepare the statements since 1998, establish that the financial statements they prepared for Respondents were not audited financial statements. See Affidavit of Dennis Jamieson. And, Respondents have not provided any support for their claim that filing an unaudited financial statement is an acceptable option to filing an audited financial statement. Indeed, Mr. Jamieson’s affidavit shows that on more than one occasion, his Company advised Respondents that HUD required that the annual financial statements required by the Regulatory Agreement be audited financial statements. See ¶ 4. Respondents’ assertion, under these circumstances, does not create an issue of material fact, requiring a hearing in the case.

As to the timeliness of the filings of the unaudited reports, it is undisputed that Respondents’ annual financial statements for the years ending December 31, 1999, 2000, 2001, and 2003 were each over a year late. Respondents’ financial statement for the fiscal year ending December 31, 2002 was at least five months late. Respondents offer extenuating circumstances for late filing, including lack of awareness of the requirement for electronic filing until several years after it was imposed, the claim that electronic filing is costly and burdensome to Respondents, and the Secretary’s delay in providing Respondents with a necessary identification number for the fiscal years prior to May 2001. Respondents also argue that HUD was responsible for the failure to timely file in 2003 because it informed them in February 2004 that his previous filings had been unacceptable but did not offer them an acceptable alternative. These claims of extenuating circumstances are insufficient to require a hearing in the case with regard to the violations charged, but may be relevant to the civil money penalty assessed. Respondents had the obligation to keep informed of the Secretary’s requirements for the filing of financial statements. See *Crestwood*, *supra*. Their failure to file the required financial statement, and in a timely manner, justifies imposition of a civil money penalty.

Accordingly, the Government is entitled to summary judgment as to the fact of Respondents’ violations as charged in the Complaint. See Fed. R. Civ. P. 56 (c). The Motion for Summary Judgement as to the violation of 12 U. S. C. § 1735f-15(c) (1)(B)

for the knowing and material failure to file audited financial statements for the fiscal years 1999, 2000, 2001, 2002, and 2003 is *HEREBY GRANTED*.

However, there is an issue of material fact as to the amount of civil money penalty that should be imposed in this case. The Government has requested the maximum penalty. The regulations provide that the maximum penalty for each violation is the amount of loss that the Secretary would experience at a foreclosure sale, or a sale after foreclosure, of the property involved. *See* 24 C.F.R. § 30((a) (6). And, HUD regulations at 24 C.F.R. 30.80 require the consideration of eight factors and others such as justice may require to determine the appropriateness and amount of a civil money penalty. Respondents have asserted that they, individually and collectively, are unable to pay the maximum penalty sought in this case. The Government's pleadings do not include a discussion of what the amount of loss to the Secretary would be, and its discussion of the eight factors required does not show why maximum penalty is appropriate. Accordingly, summary disposition on the amount of the civil money penalty is not appropriate. Accordingly, the Motion for summary judgment on the pleading as to the amount of civil money penalty is, therefore, *DENIED*.

Testimony at the hearing in this case, previously set for April 18, 2006, will be limited to the amount of civil money penalty that should be imposed against Respondents for the violations alleged in the Complaint and established by this Order.

SO ORDERED this 16th day of March, 2006.

CONSTANCE T. O'BRYANT
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION FOR SUMMARY JUDGMENT**, issued by CONSTANCE T. O'BRYANT, Administrative Law Judge, HUDALJ 05-040-CMP, were sent to the following parties on this 16th day of March, 2006, in the manner indicated:

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